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No. 1586

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

WILLIAMSBURGH CITY FIRE INSURANCE COMPANY OF BROOKLYN (a corporation),
Plaintiff in Error,

vs.

LEON WILLARD, doing business under the firm name of LEON WILLARD & CO.,
Defendant in Error.

BRIEF OF H. U. BRANDENSTEIN, AMICUS CURIAE.

H. U. BRANDENSTEIN,
Amicus Curiae.

Filed this...day of June, A. D. 1908.

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Note.

On the oral argument attention was drawn to the fact that by the provisions of the lightning clause loss or damage by cyclone, tornado and wind storm is excluded. (The Bergin form names cyclone and wind storm and the Warmcastle and Beakes form names all three.) As was pointed out upon the argument, these exceptions admittedly have relation not to damage done by lightning or fire ensuing upon or caused by these perils, but to the damage done by these perils themselves. But "hurricane" is named as an excluded peril in the body of the policy. Hence, if defendant's contention be sound it would *not* be liable for a loss *by fire* occasioned by "hurricane" but (under the lightning clause) it *would be* liable for such a loss as well as a loss by lightning if the fire or lightning was occasioned by "cyclone", "tornado" or "wind storm". Thus, in order to uphold its contention, defendant must distinguish between hurricanes on the one hand and cyclones, tornadoes and wind storms on the other!

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This brief is presented to this Honorable Court with no view of supplementing the authorities submitted on behalf of the Defendant in Error, but with the hope of further developing, and possibly strengthening, certain propositions ably presented by counsel for Defendant in Error. I shall, therefore, cite few cases, but will deal with certain aspects of the problem now before this Court on prin-

ciple and reason, contenting myself, for the most part, with the citation of authorities in support of the points made in the brief of counsel for Defendant in Error.

THE POINT IN ISSUE.

The controversy turns on the meaning of the words "occasioned by or through" occurring in the following clause of the insurance policy, to wit:

> "This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or for loss or damage *occasioned by or through* any volcano, earthquake, or hurricane, or other eruption, convulsion, or disturbance; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by agreement endorsed thereon."

The question is not one of positive law at all, but purely one of the construction of language. We start with the premise that the meaning of words is not a matter of exact or mathematical determination, and that two persons of an equally high order of intelligence may arrive at diverse conclusions as to the meaning of certain words, and may sup-

port their conclusions with equally forcible reasons. Neither can be said to be wrong, for no one but the man who used the language in question can know what meaning he intended to give it; nor can he, for the matter of that, tell any better than its interpreters what the language actually means.

THE PROPER RULE OF CONSTRUCTION.

The rule of construction to guide this Court in its deliberations is whether or not the interpretation placed on the language by the Circuit Court is *reasonable.* While, of course, this Court is not to be deprived of its right of original opinion as to the meaning of the words, independently of the conclusions of the lower Court, those conclusions should be of great weight in establishing the thesis of the Defendant in Error, namely, that a *reasonable* construction of those words should give them the meaning for which he is contending. It is true that, unlike the case of a review of questions of fact determined by the trial Court, this Court is not limited to ascertaining whether the conclusion of the trial Court in construing a written document is reasonable, and has no right (theoretically at all events) to upset that conclusion because it does not accord with its own view, provided it be *reasonable.* Yet, in a measure, the functions of the appellate and of the trial Court in both instances are analogous; for the construction of language is not really a matter of law at all, but purely one of fact.

Aside from the general rule of law, which is based in reason, that the language of a policy should be construed most strongly against the insurer and in favor of the insured—which is applicable with peculiar force to exemption clauses—this Court is primarily concerned with the *reasonable* construction of the clause under consideration. In other words, this Court must put to itself the inquiry whether a reasonable man would have understood the words used in the sense that the insured now contends he did understand them, and in which contention he is upheld by the rulings of the trial Court.

There is one further canon of interpretation, independent of the rule of strict construction, which, like that rule, is based in reason, and that is that all the words used in a contract must, if possible, be given value. In other words, it must be assumed that the party to the contract who drew it, used no words idly. Bearing in mind these simple principles, amply supported by the authorities cited in the brief of the Defendant in Error, we proceed to an examination of the clause under discussion.

Before attempting an analysis of both exemption clauses contained in the policy I may say that the *ratio decidendi* of the trial Court is so explicitly stated in the decisions of both Judge Whitson and Judge Van Fleet, and so ably re-expounded in the brief of counsel for the Defendant in Error, that to touch upon that ground again would be supererogatory.

ANALYSIS OF EXEMPTION CLAUSES.

It is essential for a proper understanding of the particular exemption clause now under examination to study it in conjunction with the exemption clause immediately preceding it. The first exemption clause provides that the company shall not be liable for loss caused directly or indirectly by certain enumerated perils. And here note that *none of these perils could be caused by fire, but any of them might cause fire.* The second clause under discussion provides that the company shall not be liable for loss or damage occasioned by or through certain other enumerated perils. And here note that *all of these perils could be caused by fire* (or electricity, which in its effects upon property is kindred to fire). (And I do not exclude even "theft", though properly not a peril—any more than the neglect of the insured to use reasonable means to save the property—for the reason that recovery for loss by theft is permitted only on the theory that it is a loss actually caused by fire. Nor is hurricane to be excluded, for it is a scientific fact that a hurricane may originate in electricity. And in some policies of insurance this is so far expressly recognized that the exemption clause, in terms, provides that the company shall not be liable for damage by wind storms, whether of electric origin or not.) Without too fine an analysis, that is the broad general *difference* in *character* of the *perils* enumerated in these two distinct clauses, from which the insured is justified in reasonably believing, that the two clauses aim

at two distinct purposes. The first clause seeks to absolve the company from liability done by *fire* caused by the enumerated perils, and the second clause seeks to absolve the company from liability for damage *other than fire* damage done by or through perils, which were, however, themselves *caused* by fire. In other words, *the first clause seeks to exempt the company from liability for actual fire damage done to the property, whereas the second exemption clause aims to exempt the company from liability for damage other than fire damage but itself caused by fire.*

Right here it becomes important to analyze and oppose to each other the distinguishing words of the two exemption clauses. The word "*caused*" is independent of the *nature* or *character* of the damage done. The word "*occasioned*", on the other hand, is independent of the *means* or *cause* of the occasion. "*Occasioned*" means simply "produced" or "*done*"; i. e., regardless of the cause by which the damage referred to is produced or done. The company, to repeat, in the first clause was aiming to exempt itself from liability for an actual fire loss, and in the second exemption was attempting to secure itself against liability for damage done by a peril other than fire, though that peril did originate in or was caused by fire. That this is a just and reasonable interpretation of the second exemption clause, namely, that it applies to damage done or occasioned or produced otherwise than by fire, although the immediate agency of damage was itself caused or

put in motion by fire, and entirely consistent with the fact that the policy is primarily an indemnity contract against fire loss or damage, is obvious for the following reason:

I recall that all the exempted perils in the second exemption clause might be caused by fire, whereas none of the perils exempted in the first exemption clause could be caused by fire. Now then it is reasonable to assume first that the man who used the words "occasioned by or through", applying them to perils that can be caused by fire (or electricity, analogous, as stated, in its effects, to fire), intended to differentiate them from the words "caused directly or indirectly" applied to perils that could not be caused by fire. Further, this assumption is not only reasonable, but the contrary assumption, that he did not intend a different meaning by a change in the use of the words, violates the rule of interpretation that no words must be assumed to be idly used. And, if we were to indulge the insurer in such presumption, namely, that these words were idly used, we should be construing exemption clauses not strictly, but loosely and benevolently in favor of the insurer.

What purpose, then, it may be asked, had the insurer in exempting itself, in terms, from loss or damage occasioned by or through earthquake and the other enumerated perils if not to exempt itself from the fire caused by those perils? The answer is not difficult. The insurer intended to make it

clear that it should not be liable for anything but an *actual fire* damage, i. e., damage by *combustion* or *ignition* of the property. The insurer had a right to assume, independently of any decisions, that any damage to insured property, whether that damage was of the peril insured against or not, would legitimately be deemed a fire loss, if the peril which did, or occasioned, or produced the damage was itself caused by fire. As an illustration: In all reason and common sense it can be well held that the damage caused to insured property by explosion without ignition of the property is a fire loss within the policy, provided the explosion itself was caused by fire. It was to guard against this reasonable and proper construction of a fire insurance policy that the insurer made this second exemption clause. I take the illustration of explosion because, while the illustration of earthquake would be equally forcible, yet that an earthquake itself always or ever is caused by subterranean fire may or may not be a scientific fact. It is true, however, that the majority of the uninitiate, whatever may be the scientific truth, do not today know whether an earthquake is caused by subterranean fire or not. It is fair to assume that this clause of the policy was not drawn by a scientist, and that the man who drew it did not know but that an earthquake may originate in or be caused by a fire, i. e., subterranean fire. And that it is caused by subterranean fire I understand is the case when it is of volcanic origin. The collocation of the peril

"volcano" with "earthquake" and immediately preceding it emphasizes the point.

It is obviously true that common sense and sound reason would induce a man to hold that a damage done or produced or occasioned by an agency other than fire, but itself caused by fire, would strictly and properly be a fire loss.

And to this effect are the authorities:

> "Loss or damage by fire includes not merely the injury done by the combustion, heat, smoke, and expansive effects of the fire, but also by any falling, displacement, or change of quality thereby caused, as well as the injury done by water or chemicals in extinguishing fire, or in moving goods, or trampling on them, or blowing up buildings in a bona fide attempt to extinguish or stay the fire; the company is liable for any loss which is the proximate result of a fire, although fire does not itself extend to place where damage is done, *actual ignition or combustion is not necessary.*"

Clement on Fire Insurance, Vol. 1, page 87, and authorities cited.

> "A loss or damage by fire necessarily includes not merely the injury done by combustion, heat, smoke and expansive effect of the fire but also by any falling, displacement or change of quality thereof caused as well as the injury done by water or in removing goods or blowing up buildings in a bona fide attempt to extinguish or stay fire."

Heur v. Westchester Fire Insurance Company, 45 L. R. A., page 439.

Damage by water used to extinguish fire is a fire loss:

Ermentrout v. Gerard Fire Insurance Co., 65 N. W. 635: *Actual ignition is unnecessary* if the damage is the direct result of the loss, as for instance when a wall falls from an adjoining building by reason of fire therein.

See also, *New York Express Company v. Traders Insurance Co.,* 133 Mass. 377;

Lynn Gas & Electric Co. v. Meridian Fire Insurance Co., 158 Mass. 510; (short circuiting of machinery by reason of injury to wires by fire);

American Steam Boiler Co. v. Chicago Sugar Refining Co., 57 Fed. Rep. 294.

Now then, aside from any independent reasoning on the problem or any authorities the force of this argument, it seems to me, is absolute, in view of the express provisions of the Civil Code of this State, with reference to which provisions it must be assumed the contract was made. Section 2626 of the Civil Code reads as follows:

> "An insurer is liable for a loss of which a peril insured against was the proximate cause" * * *. (Then follows language not bearing immediately on the problem.)

Under this section of the Code, can there be the slightest doubt that if the property had been demolished by an explosion or other disturbance caused by fire that the insurer would have been liable even

though there was no actual ignition or combustion of the property? Assuming, as we must, that the insurer framed this exemption clause with a view to the statute law of this State, *and for the purpose of excluding its operation*, surely it is obvious that what the insurer was aiming at was to absolve itself from any loss which was not itself a fire loss, though caused by fire. And that, I submit, it has successfully done, but beyond that it has not gone.

It is clear then, that the insured would rightly assume that under the opening sentence of the policy whereby the company "does insure——— " (the insured) against all direct loss or damage by " fire, *except as hereinafter provided,*" that he was thereby protected against two classes of loss, viz., first, loss by *fire* damage, and second, loss by damage *other than fire*, itself caused by fire.

Continuing then our line of reasoning, which is not at all formal, but accords with the methods of the ordinary, reasonable, thinking human being: the insured having been thus advised that the liability of the company is for two classes of loss, reads the *caveat* "except as hereinafter provided". His eye runs down the policy until it is arrested by the first exemption clause, and here he finds enumerated a number of perils which, *in the nature of things, are the causes of fire, and not caused by fire.* He reads, for example, that the company shall not be liable for loss caused etc., by *invasion, insurrection, riot, civil war,* etc., etc. And, without indulging

in any fine analysis of the clause, or any nice interpretation of any of these perils, the general purpose of the clause strikes him immediately to be the exemption of the company from *actual fire* damage caused or set in motion by these enumerated perils. His eye next meets a *distinct* and *independent exemption clause,* which not only categorizes perils in their nature distinct from those enumerated in the first exemption clause, but is prefaced by the words "*occasioned* by or through". To him the word "*occasioned*" must mean actually "*done*" or "produced". He is not engaged in a metaphysical or philological investigation of the meaning of the words, but he does know, broadly, that the word "*occasioned*" has the meaning of "*produced*". And the lexicographers will bear him out, that the word "produced" means "effected" or "made" or "done". He knows also that he has been advised, in the very opening clause of the policy, that the company is protecting him against *two kinds of damage*, namely, a direct *fire* damage, and a damage of some other peril *caused by fire,* except as in the policy later provided. He meets this first provision, which looks only to fire damage caused in a certain way. He is next admonished, by the *nature* and *character* of the perils enumerated in the second exemption clause, that the company *now* is guarding itself against liability for the *second class* of damage, for which, without such qualification, it would be liable, viz, damage other than fire damage, itself caused by fire. The insured *naturally* and *reason-*

ably infers that in this second exemption clause, with a specially enumerated class of perils, distinct in their nature and character from those enumerated in the first exemption clause, the company is seeking to protect itself against liability for a damage which is not fire damage, but is itself caused by fire.

The popular and just understanding of the word "occasioned" is "produced", "*done*" or "brought about", It is wholly independent of the origin or *cause* of the damage. If the insurer had intended to say that it was exempting itself from liability for damage occasioned or done by fire caused by certain perils, earthquake, explosion, etc., and not from liability for the damage occasioned or done to the property by those perils without the ignition or combustion of the property, *it was its duty to leave nothing to inference and to make its intention plainly manifest.* In further fortification of this view the last sentence in the clause under discussion: " but liability for *direct* damage by lightning may " be assumed by agreement endorsed thereon", is of some weight. The very fact that it provides for its liability for direct lightning damage makes it clear that with respect to all the other exempted perils it was exempting itself from the direct and natural damage done or occasioned by those perils. However, this reinforcement is in no sense necessary to the weight of the preceding considerations.

It may here be noted that some point is sought to be made of the clause reading "or (unless fire en-

" sues, and, in that event for the damage by fire " only) by explosion of any kind, or lightning". As if the company by specially assuming liability for fire caused by explosion or lightning was thereby impliedly exempting itself from liability for fire caused by other perils enumerated in the second exemption clause. But the true answer would compel the reverse conclusion. The very fact that the words "unless " fire ensues, and, in that event for the damage by " fire only" are put in *parentheses* shows that *they are at best a restatement or reaffirmance of the original obligation assumed by the insurer toward the insured in the opening paragraph of the policy.* They are in no sense intended as a new promise, as pointed out so ably in the brief of counsel for Defendant in Error. They are but a reiteration of the liability assumed and expressed in the opening sentence of the policy. The reason for the reiteration is obvious; it is used in conjunction with the perils of explosion and lightning, to avoid confusion in the mind of the insured as to the extent of the exemption because of the ignition and combustion usually accompanying lightning and explosion, and not generally accompanying the other designated perils.

The parenthetical clause in effect simply carries forward the original undertaking of fire insurance. It is as if the clause read "if fire ensues, and then, " of course, for the damage by fire only". The parenthesis is equivalent to the phrase "of course". To attribute to this parenthetical interpolation the

force of an exemption of the company from fire caused by the enumerated perils would do violence to the simplest rules of interpretation.

By way of recapitulation, a policy of fire insurance, in the absence of limitation, makes the insured liable for damage done by two classes of perils, to wit: direct damage by fire, whatever the cause of the fire; and, second, indirect damage by fire, to wit, by a peril other than fire, but caused by fire. Without the limitation or qualification of the liability of the insurer by these two exemption clauses the insured would be protected against fire no matter what its cause, and against any peril whatever, if caused by fire. To qualify the scope of the fire insurance the two exemption clauses were inserted, the purpose of the first exemption clause being to make the origin or cause of the fire determinative of the insurer's liability; the purpose of the second clause being to confine the liability of the company to actual fire damage. If these two exemption clauses had not been inserted, then the insurer would be liable for actual fire damage, however caused, and for an indirect fire damage, i. e., a damage by some other peril, if caused by fire.

The construction contended for is *reasonable.* And when the insured has presented to this Court a *reasonable* construction of the policy that harmonizes all its various provisions,—a construction not only reasonable but, in my judg-

ment, *true*—he has discharged his burden. It requires, as stated, extreme benevolence of construction to ascribe to the insurer no reason for changing the phraseology of two distinct exemption clauses, each of which is a catalogue of perils distinctive in their nature in one particular, namely, in this, that the one class could not be caused by fire and the other could be caused by fire. The rule of liberal construction of a policy of insurance in favor of the insured is not only based upon the general principle of law that the language of a contract is to be construed most strongly against the author of it, particularly when that language expresses a reservation of a right or exemption from liability of the author, but, also, on the further fact that the individual insured occupies substantially the same relation to an insurance company that a shipper does to a common carrier. He is not on a basis of equality with the insurance company, but is, in point of actual fact, at its mercy, and obliged, by reason of the absolute commercial necessity for insurance, to take the printed terms of the contract given to him by the insurance company. The construction now asked for by the defendant in error secures no intendment in his favor, but at best asks for only that which is reasonable—not only reasonable but far more probable than the construction asked for by the Defendant and Plaintiff in Error.

Further I may add, that it is obvious that the clause under consideration was drafted with full knowledge of and reference to Section 2626 of the

Civil Code, and to put the insurer outside the operation of that section of the Code. All the other specifications of its liability and exemption were laid down with full cognizance of the other sections of the Code referred to by counsel for Plaintiff in Error, and with a view to their exclusion. And those express specifications of the contractual obligations of the insurer must govern the interpretation of the document under discussion and override all statute law in conflict with them.

The contention of counsel for Plaintiff in Error to the contrary is somewhat extraordinary. Reduced down as I understand the argument, it is as follows:

Concede, if you will, that the undertaking of the insurer does read as follows, viz:

"The company insures you against damage by
"fire, whether that damage be actual fire damage
"or be damage other than fire, though caused by
"fire; except that the company does not insure
"you against pure earthquake damage, though the
"earthquake originate in fire."

Still the law will benevolently step in and say to the Insurance Company: "You have not expressed "the intent in your exemption with the fullness that "the law desires." Though you have specifically said it is only from actual damage by earthquake caused by fire from which you have exempted yourself, yet the law provides that you shall thereby be exempted not only from the earthquake damage

proper but, also, from any fire that may be caused by the earthquake. The very statement should carry with it its refutation. It is not necessary that parties should in terms contract themselves outside the operation of a given statute. It is sufficient if their intention to do so can be gathered from the express specifications of their contractual rights and duties. It must be clear that the company has defined its position and laid down just what liability it has intended to incur and what to avoid, and that having expressed itself fully on the whole subject-matter of the contract, it intended to exclude the operation of any statute in conflict with its provisions. The parties are entirely at liberty to contract themselves outside the terms of a statute, if that statute is not intended to preserve any principle of public policy. And that, I submit, they have done in the case at bar. The attempt to abide by their own terms and not the terms of the statute is to be gathered as readily by implication as by expression. The insurer has spoken, and in unmistakeable terms laid down the extent and the limitations of its undertakings. Is the Code to step in beneficently and add a qualification that the company had chosen not to insert in express terms into its contract? Such an interpretation would be benevolence run riot in favor of the insurer, and would make the insured an outlaw.

The argument, in part, of Plaintiff in Error, reduced down, is this: The insurance company could not have been guilty of the error of excluding itself

from liability for a damage for which it had not assumed any liability in the opening undertaking of the policy. The contrary assumption would be to accuse the insurance company of the offense of indulging in surplusage. But, aside from the fact that it is clear that the second exemption clause was intended for the specific purpose of exempting the company from damage other than fire, for which it might be liable as for a fire damage, it would be the wildest extravagance of benevolence on the part of this Court to grant the company immunity from its express undertaking in the essential sentence of the policy to protect the insured against fire because of a desire to shield it from the awful charge of surplusage. "We cannot admit anything but fire "caused by earthquake or explosion", says the company, "in our second exemption clause, because "we were only insuring you against fire loss. To "make it appear otherwise would be to accuse us "of attempting to exempt ourselves from something "for which we were not liable." In the first place the answer of the insured is direct and positive: "You insured me against *fire* and you cannot exempt yourself from any *actual fire* loss, *whatever "its origin*, unless you can show that you excluded "the fire of any particular kind of origin. And that "you have not done by the inferential argument "that if you haven't done it you have been guilty "of surplusage. You admit that you have not in "terms said that you were exempting yourself from "fire originating in earthquake, and that admission

must be fatal to your contention." But the language was not unnecessary, as stated, because the perils enumerated were of such character that they might have originated in fire, and the company's concern was to exempt itself from all such damage, i. e., damage done otherwise than by fire, though caused by fire. Even if the Court must conclude that the language is surplusage, it should rather so conclude than absolve the insurer from the express letter of its undertaking.

For the reasons stated I submit that the judgment should be affirmed.

Respectfully submitted,

H. U. Brandenstein,
Amicus Curiae.